IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC87748
	)	
ROBERT W. DAVIS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT, DIVISION NO. 3
THE HONORABLE LUCY D. RAUCH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. The oath to the jury helps maintain the formal dignity of the courtroom, but it is not a mere formality. A verdict rendered by an unsworn jury is a nullity. Requiring Mr. Davis to prove prejudice is illogical where it was the Court's duty to swear the jury and the State shared the responsibility of making sure Mr. Davis received a fair trial. Because the jury oath has clear implications on a defendant's constitutional rights beyond the defendant's right to trial by an impartial jury, the trial court's failure to swear the jury cannot be "cured" by the presence of other safeguards to that right.

The State's argument that the trial court's failure to administer the oath to the jury panel was harmless error disregards the significance of the oath in judicial proceedings, suggesting that because other safeguards such as *voir dire*, peremptory challenges, and precautionary instructions are present, the administration of the oath to the jury is a formality that a court can disregard. *See* Respondent's Brief at 28-30 (citing *State v. Vogh*, 41 P.3d 421, 426 (Or.App. 2002)), and 34-38. But the United States Supreme Court recently discussed the judiciary's "concrete objective" of maintaining dignity in the judicial process, stating:

> The courtroom's formal dignity . . . reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of

> purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve.

Deck v. Missouri, 544 U.S. 622, 631, 125 S.Ct. 2007, 2013 (2005). Unquestionably, the jury oath helps maintain "the courtroom's formal dignity." *See United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir. 1984)(stating that "[s]wearing the jury immediately prior to the trial serves to emphasize the importance and the seriousness of the juror's task"). And while there are other safeguards to a defendant's right to a fair jury trial, none are as capable of instilling in the jurors the solemnity of its duties as the formal oath. It's appalling that the trial court overlooked such a fundamental element of the jury trial in presiding over Mr. Davis' case. If the trial court cannot be relied upon in its role of maintaining the "dignity and decorum" of the court proceedings, *see Deck* at 631, what confidence can this Court, or the public, have in its rulings on evidentiary issues or its impartiality?

Respondent urges this Court to overrule its longstanding precedent that a verdict by an unsworn jury is a nullity, *see, e.g., State v. Mitchell*, 199 Mo. 105, 97 S.W. 561 (1906), *State v. McKinney*, 221 Mo. 467, 120 S.W. 608 (1909), and *State v. Frazier*, 339 Mo. 966, 98 S.W.2d 707 (1936), and find that the failure to object at trial should operate as a complete waiver of any complaints regarding the swearing of the jury, comparing Mr. Davis' case to juror misconduct cases. Respondent's Brief at 32. Specifically, in addressing Mr. Davis' argument that the error was structural,

Respondent argues that "numerous cases addressing other issues that implicate a defendant's right to a fair trial by an impartial jury – such as juror misconduct – do not treat it as structural error." Id. Of course, Respondent's contention is not valid as to all possible issues implicating a defendant's right to a fair trial by an impartial jury, such as the bench trial of a defendant without a valid waiver of a jury trial, but Respondent fails to acknowledge the cases Mr. Davis cites in his initial brief on that subject. *See* Appellant's Brief at 29 (citing *State v. Hamilton*, 8 S.W.3d 132 (Mo.App. S.D. 1999) and *State v. Rulo*, 976 S.W.2d 650 (Mo.App. S.D. 1998)).

The court's failure to swear a jury is much more analogous to the bench trial of a defendant without a valid jury waiver than to matters of juror misconduct. First, both the conduct of a jury trial without the administration of the proper oath, and the conduct of a bench trial without a valid waiver of the defendant's right to a jury trial, concern errors of the court "affecting the framework within which the trial proceeds." *See Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S.Ct. 1246, 1264-65 (1991). It is first and foremost the *trial court's* duty to administer the oath to the jury or to ensure that a defendant waiving his right to a jury trial has made his decision to do so voluntarily. In contrast, issues of juror misconduct concern a *juror's* failure to abide by his oath and follow the court's instructions. While the trial court can exercise discretion in determining whether an incident of misconduct warrants a mistrial or new trial, *see State v. Babb*, 680 S.W.2d 150 (Mo.banc 1984), the same cannot be said for the

swearing of the jury. Administering the oath to the jury is not discretionary. Rule 27.02.

Second, the trial of a defendant by an unsworn jury is in effect a trial without a jury, because anything that transpires thereafter is a nullity. *Mitchell* at 562 (noting that a jury is not a "lawfully constituted tribunal" if the oath was not administered). Therefore, a defendant's failure to object should not constitute a waiver of a defect in the administration of the jury oath absent a compelling record that the failure to object was deliberate and not mere oversight. *See State v. Rulo*, 976 S.W.2d 650 (Mo.App. S.D. 1998) (review for plain error was warranted and reversal was required where the record was "void of any reference to jury waiver"); *cf. State v. Hatton*, 918 S.W.2d 790 (Mo.banc 1996) (plain error review not warranted where defense counsel advised court that defendant was "waiving jury" and court did not make independent inquiry of defendant). Regardless, there is no indication in the present case, in contrast to the jury misconduct cases cited by the State, that defense counsel was aware of the court's failure to swear the jury but decided to remain silent for tactical advantage on appeal. *See* Respondent's Brief at 32 (citing *State v. Merritt*, 750 S.W.2d 516, 518 (Mo.App. W.D. 1988), *State v. Vinson*, 503 S.W.2d 40, 41 (Mo.App. Spfld.D. 1973), and *State v. Brown*, 599 S.W.2d 498, 502 (Mo.banc 1980) (all stating that "[a] defendant aware of a juror's misconduct cannot gamble, through silence, on a verdict of acquittal and, after a verdict of guilty is returned, take advantage of the matter by first asserting it in his motion for a new trial").

Respondent also argues that "the record of this case demonstrates that the twelve people selected to hear appellant's case did 'well and truly try the case,' even though the formal oath was not administered," simply because they were questioned under oath about their ability to follow the court's instructions and their qualifications as jurors. Respondent's Brief at 34. But the fact that the selected jurors were not eliminated for cause does not automatically beget the conclusion that the jurors followed an oath they were never given to well and truly try the case. In fact, a review of the record of the jury instructions and deliberations in this matter leads to a different conclusion altogether: that the jury spent no time considering the evidence and convicted Appellants Davis and Bainter after rote voting on each of the charged offenses [*See* L.F. at 101-141; Tr. at 1074-1084, 1187-89 (after week-long trial, jury given 54 instructions in the cause, yet rendered separate verdicts on all 18 counts against both Appellants Davis and Bainter in just two hours and seven minutes)]. Who's to say what subtle influence the court's failure to administer the oath had on the jury? Perhaps it led the jury to think, even subconsciously, that the court and prosecution were certain of the defendants' guilt and the jury's only duty was to sign the verdict forms.

While the prejudice may be speculative, so would any determination that the error was harmless. As with other structural errors, such as the denial of the right to a public trial, "a requirement that prejudice be shown 'would in most cases deprive [the defendant] of the . . . guarantee, for it would be difficult to envisage a case in which he

would have evidence available of specific injury.'" *Waller v. Georgia*, 467 U.S. 39, 50, 104 S.Ct. 2210, 2217 n.9 (1984), quoting *United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 608 (3rd Cir. 1969). To require Mr. Davis to prove prejudice here would effectively deprive him of his right to a trial by a jury "sworn well and truly to try the case." Rule 27.02(d). As noted in *State v. Goucher*, 111 S.W.3d 915, 919 n.6 (Mo.App. S.D. 2003), "[i]t is illogical to force an appellant to 'prove' the strict burden under Rule 30.20 when the fault lies not only with the defendant, but also with the prosecutor and the judge." It was the court's duty to swear the jury, Rules 27.01 and 27.02 and § 546.070, and the prosecutor shared in the responsibility of making sure that Mr. Davis received a fair trial. *See State v. Selle*, 367 S.W.2d 522, 530 (Mo. 1963). A showing of prejudice from the failure to swear the jury was not required in *Mitchell* and should not be required here.

Respondent also argues against the validity of Mr. Davis' argument, and the Eastern District's conclusion, that the swearing of a jury is not a mere formality because jeopardy attaches when a jury is impaneled and sworn, contending that the "oft-repeated maxim that the double jeopardy clause attaches in a jury trial when the jury is empaneled and sworn . . . is not a bright line rule." Respondent's Brief at 36. Respondent notes that double jeopardy would not bar retrial in cases in which the jury was impaneled and sworn, but no verdict rendered, due to a hung jury or a mistrial not resulting from state misconduct. Id. (citing *State v. Smith*, 988 S.W.2d 71, 78 (Mo.App. W.D. 1999)). But the fact that the Double Jeopardy Clause would not bar

subsequent prosecution in those instances does not mean that jeopardy does not attach when the jury is empaneled and sworn, or that the administration of the jury oath is irrelevant to the issue of jeopardy.

The United States Supreme Court examined this matter at length in *Crist v. Bretz*, 437 U.S. 28, 37-38, 98 S.Ct. 2156, 2162 (1978), stating,

> If the rule that jeopardy attaches when the jury is sworn were simply an arbitrary exercise of line drawing, this argument might well be persuasive, and it might reasonably be concluded that jeopardy does not constitutionally attach until the first witness is sworn, to provide consistency in jury and nonjury trials. Indeed, it might then be concluded that the point of the attachment of jeopardy could be moved a few steps forward or backward without constitutional significance. But the federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns-the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury-have combined to produce the

> federal law that in a jury trial jeopardy attached when the jury is empaneled and sworn.

(footnotes omitted). The court noted that the swearing of the jury was the "lynchpin" for all double jeopardy jurisprudence and concluded that "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy." 437 U.S. at 38, 98 S.Ct. at 2162 (finding that Montana statute that jeopardy did not attach until first witness was sworn violated the Fifth Amendment's double jeopardy clause, made applicable to the states by the Fourteenth Amendment). The significance of the jury oath has implications on the defendant's constitutional rights beyond safeguarding the right to trial by an impartial jury; therefore, the trial court's failure to swear the jury cannot be "cured" by the presence of other safeguards. This Court must reverse.

II. The uncharged crimes evidence introduced in Mr. Davis' case does not fit into any of the recognized categories encompassing the identity exception. Therefore, the trial court erred in overruling Mr. Davis' objections and admitting the highly prejudicial evidence of the McDonald's Bar robbery at his trial.

Although the court of appeals found the issue of the jury oath dispositive and did not review Mr. Davis' claim that the trial court improperly admitted evidence of uncharged crimes evidence under the identity exception, just recently the court reversed another defendant's convictions because Judge Lucy Rauch, who also presided over Mr. Davis' trial, erroneously admitted uncharged crimes evidence the State claimed was necessary to prove the defendant's identity. *State v. Holleran*, 197 S.W.3d 603 (Mo.App. E.D. Aug. 1, 2006).

In *Holleran*, the defendant was charged with tampering for driving a stolen Chevrolet Blazer. The highway patrol had received a report of a Blazer being driven in a reckless manner. *Holleran* at 606. A state trooper spotted the vehicle and initiated a traffic stop. *Id.* The driver pulled into a parking lot and exited the vehicle while two passengers remained inside. *Id.* When the trooper asked the driver for his identifying information, the driver took off running, and the trooper was unable to stop him. *Id.* But the trooper was able to stop the passengers, a juvenile, and a woman named Cassandra Furlong. *Id.* The juvenile said the driver's name was "Jay" and he pointed to a service station where he said "Jay's" sister, Stephanie Warren, worked. *Id.* The

person later identified as "Jay," James Gegg, claimed that defendant Holleran had used his name in the past. *Id.* at 607. After viewing photographs, the trooper determined that Holleran, not Gegg, had been driving the vehicle, which was stolen; and the state charged Holleran with tampering, resisting arrest, and receiving stolen property. *Id.* At trial, the court permitted the state to read evidence of the defendant's convictions on pleas of guilty for felony stealing of items from Wal-Mart, in concert with Furlong and Warren, a week after the tampering incident for which he was on trial, to infer that the defendant was driving the stolen Blazer on the night in question. *Id.* at 607-08. But the Eastern District reversed, finding the evidence of the guilty pleas not logically relevant to the charged offense on the issue of identity as "the fact that defendant was with these two women a week later does not incriminate him." *Id.* at 610.

The court acknowledged that uncharged crimes evidence may be admitted "to connect and identify a defendant with the case on trial if identity is in issue." *Id.* at 609. It then identified three categories "in which other crimes evidence is logically relevant to prove identity." *Id.*

First, admission of uncharged crimes evidence may be permitted under the *modus operandi* exception to show identity if there is a "striking similarity in the type and methodology of crimes committed," and the crimes "share a unique methodology identifying the defendant as the perpetrator." *Id.* Second, such evidence may be admissible if the "misconduct has occurred in an encounter that explains an

eyewitness's ability to identify a defendant." *Id.* at 610. Third, other crimes evidence may be admissible to show identity where evidence of the uncharged crime seems to "trace" the defendant to the crime. *Id.*

In explaining "trace" cases, the court stated,

> In the trace cases, there are two common denominators. The first is that the issue is the defendant's possession of a thing or place. The prosecutor attempts to link or trace the defendant to a thing such as an attaché case or a place such as a room. The second commonality is that the prosecutor offers evidence of objects bearing the defendant's name that were found in the thing or at the place in question. When these two factors concur, the courts admit the evidence to establish the defendant's identity as the criminal even if the evidence suggests uncharged misconduct by the defendant.

Id.

While at first blush, this exception may appear applicable to defendant's case, a review of the cases upon which the appellate court based its reasoning show that the uncharged crime evidence must be directly related to the charged offense and only incidentally suggest other criminal behavior. For example, a defendant's later possession of the instrumentality to commit the crime or the fruits of the crime may be admissible even though they show the commission of other crimes. *Id.*, citing *State*

v. Herrington, 890 S.W.2d 5 (Mo.App. W.D. 1994) (evidence that gun used in crime was found concealed in driver's side door compartment when defendant arrested admissible), and *State v. Shabaz*, 467 S.W.2d 909 (Mo. 1971) (evidence of defendant's use of stolen credit card, which would constitute a separate crime, admissible to show defendant participated in robbery in which credit card was taken). Here, Mr. Davis did not claim that the evidence that he was caught with loot from the IGA robbery, or the weapon allegedly used, showed evidence of criminal conduct such as receiving stolen property or carrying a concealed weapon. The issue was the admissibility of all the testimony regarding the McDonald's Bar robbery and Ms. Dussold's identification of him from the Citgo surveillance tape that night.

For detailed evidence of another distinct crime, such as another robbery or sodomy, the "trace" exception is inapplicable and the evidence must fit into one of the other categories, such as *modus operandi* or eyewitness identification. As set forth in detail in Appellant's opening brief, the *modus operandi* exception is inapplicable to Appellant's case. And the case cited in the *Holleran* opinion regarding the eyewitness exception, *State v. Lewis*, 874 S.W.2d 420 (Mo.App. W.D. 1994), demonstrates that exception is inapplicable as well.

Specifically, in *Lewis*, the court found that an eyewitness's testimony that she knew the robber was the defendant because she had also seen him and his beat-up gun at a robbery committed two weeks earlier was admissible to show identity. *Id.* at 426. Thus, for the eyewitness exception to be applicable, it must be the *same*

eyewitness who identified the defendant for the crime on which he is on trial and for the uncharged crimes. *See id.* (citing *State v. Fingers,* 585 S.W.2d 203 (Mo.App. S.D. 1979) and *State v. Peterson,* 557 S.W.2d 691 (Mo.App. K.C.D. 1977)). Here, the State was trying to show that Mr. Davis robbed the IGA because he was identified in a Citgo surveillance tape as being in the Citgo a few hours before the McDonald's Bar robbery, the clothing worn in the Citgo video was similar to that supposedly worn by the McDonald's Bar robbery, and the McDonald's Bar robbery was allegedly similar to the IGA robbery. *See generally* Respondent's Brief at 40-41. This argument is convoluted, not logical. The eyewitness category of the identity exception simply does not apply.

Cases cited by Respondent are distinguishable. For example, in *State v. Young*, 661 S.W.2d 637, 639 (Mo.App. E.D. 1983), the court found that evidence that a defendant, on trial for forcible sodomy had sodomized two other women in a nearly identical manner of offering them a ride home, parking in a secluded area so close to another car that the victim could not open the passenger door, and orally sodomizing them was admissible under the identity exception. While defendant's acts in that case arguably showed a particular "modus operandi," that the court permitted the evidence at all is puzzling as identity did not appear to be an issue in the case, as the victim knew her attacker. *Id.* at 638. *Cf. State v. Bernard*, 849 S.W.2d 10, 18 (Mo.banc 1993) (in forcible sodomy case, evidence of similar identifying conduct, specifically, asking young men to run naked in front of his car before sodomizing them, admissible under

modus operandi/corroboration exception, to show corroboration, not identity, where victims knew their attackers). For that reason, the *Young* opinion should be seen as an aberration, or of questionable validity since proper use of the identity exception was clarified in *Bernard*.

State v. McDaniels, 668 S.W.2d 230 (Mo.App. E.D. 1984), cited by the State, similarly involved a sex crime, and the evidence establishing the modus operandi between a prior attack and the rape for which the defendant was on trial was his request for the victims to disrobe entirely before the rapes and his use of Vaseline in committing the rapes. Unlike *Young*, identity was legitimately an issue as the victims did not know their attacker. *Id.* at 233. The use of Vaseline in committing a sex crime is without question more unique than using a gun to commit a robbery. *McDaniels* does not help the State.

State v. Thurman, 887 S.W.2d 403, 409 (Mo.App. W.D. 1994), cited by the State, involved a robbery, not a sex crime. In *Thurman*, the defendant had confessed to shooting a person three weeks after the robbery and shooting in the case for which he was on trial. A ballistics expert matched the gun used in the confessed robbery to that in the charged crime. *Id.* The court held that such evidence had a "legitimate tendency to establish his identity" as the person who shot the victim in the charged offense. *Id.* In contrast, there was no ballistics evidence in this case matching the weapons in the McDonald's Bar robbery with that used in the IGA (as no shots were fired at the IGA), and Mr. Davis never confessed to the McDonald's Bar robbery.

None of the categories in which evidence of uncharged crimes is admissible to show identity are applicable in the current case. Just because identity was at issue in the case does not mean that evidence of other uncharged crimes allegedly involving the same defendants is automatically admissible. As in *Holleran*, here, the improvident admission of the highly prejudicial uncharged crimes evidence should require reversal of Mr. Davis' convictions and remand for a new trial at which all such improper evidence is excluded.

CONCLUSION

WHEREFORE, based on his argument in Points I, II, and IV of his appellant's substitute brief, and Points I and II of this reply brief, Appellant Robert Davis requests that this Court reverse his convictions and remand for a new trial. Based on his argument in Point III of appellant's substitute brief, Mr. Davis requests that this Court reverse his convictions on Counts 3-16 and discharge him. Based on his argument in Point V of appellant's substitute brief, Mr. Davis requests that this Court remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 21st day of September 2006, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the office of the Office of the Attorney General, 1530 Rax Ct., Jefferson City, Missouri 65109. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Garamond 14 point font, and does not exceed 7,750 words, 550 lines, or twenty-five pages. The word-processing software identified that this brief contains 4,194 words, excluding the cover page, table of contents, table of authorities, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

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